

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NORMA HATFIELD)	
Claimant)	
VS.)	
)	
METRO COURIER SERVICE)	Docket No. 162,872
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	

ORDER

On May 16, 1996, the application of claimant for review by the Workers Compensation Appeals Board of an Award by Administrative Law Judge John D. Clark dated January 12, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, John B. Rathmel of Overland Park, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability, if any?
- (2) Claimant's entitlement to authorized medical care.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The claimant, a 67-year-old worker, had been employed by respondent for approximately five years as a courier. On November 22, 1991, while lifting heavy boxes, claimant felt something give in her side. Later in the day she began experiencing symptoms of pain in her back and her legs began giving her difficulties. The injury was reported to her employer, Tom Holsey, two days later. She initially received treatment from a chiropractor and then went to her family physician, R. A. Argosino, M.D., and was eventually referred to Dr. Abay and Dr. Odulio. None of the treating physicians testified in this matter.

Claimant was examined by Peter V. Bieri, M.D., on November 7, 1994. He rated claimant at 12 percent functional impairment to the body as a whole. Claimant was later examined by Philip R. Mills, M.D., as the result of a court ordered independent medical examination. Dr. Mills rated claimant at a 7 percent impairment of function to the body as a whole and provided claimant with restrictions of 35 pounds maximum lift and 20 pounds frequent lift. The Administrative Law Judge adopted the functional impairment rating and the opinions of Dr. Mills and awarded claimant a 7 percent functional impairment to the body as a whole. The Appeals Board finds that the opinion of Dr. Mills is the most credible evidence and adopts the 7 percent functional impairment for purposes of this award.

Claimant contends she is entitled to a work disability in excess of the functional impairment. K.S.A. 1991 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge restricted claimant to her functional impairment denying claimant work disability. That decision was based upon an offer by respondent's representative, Mr. Holsey, that he would return claimant to work. The initial offer indicated that claimant would be placed at the same job she originally worked. When respondent was advised that claimant could no longer work that job, claimant's employment was terminated. After this termination, claimant was contacted by Mr. Holsey and advised that the company would "find something for her to do". It was not, at that time, explained what claimant's job would be. Claimant did not return to work with respondent subsequent to that second offer. In denying claimant work disability the Administrative Law Judge cited Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), as the basis for this denial of work disability. In Foulk, the Court of Appeals denied a claimant work disability after the worker refused to engage in work at a comparable wage and within the worker's restrictions, which was offered by respondent. The Court of Appeals found:

"The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further it would be unreasonable for this Court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable salary."

Respondent argues and the Administrative Law Judge found that claimant's refusal to return to work after the second offer was unreasonable. The fact that claimant was originally offered a job beyond her restrictions was not taken into consideration. The Appeals Board finds the offer made by respondent that they would "find something for her to do" was not an offer of a job at a comparable wage within claimant's restrictions. If respondent intends to rely upon Foulk to deny claimant work disability, it is necessary that an offer to accommodate within claimant's restrictions be communicated to the claimant.

The vocational rehabilitation experts who testified in this matter regarding claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage both agree that claimant has the ability to earn up to \$7 per hour on a 40-hour week. Neither doctor who testified restricted claimant to less than 40 hours per week. When comparing this to claimant's stipulated average weekly wage of \$280 the Appeals Board finds claimant has shown the ability to earn a comparable wage in the open labor market. However, it is noted both experts agree claimant has suffered significant loss in her ability to perform work in the open labor market and as such claimant is entitled to a work disability under K.S.A. 1991 Supp. 44-510e.

In determining the extent of permanent partial disability both claimant's reduction of ability to perform work in the open labor market and ability to earn comparable wages

must be considered. However as the Appeals Board has already found that claimant suffered no loss of ability to earn comparable wage, claimant's reduction in ability to perform work in the open labor market must be considered. In comparing the opinions of both Jerry Hardin and Karen Terrill, the Appeals Board notes multiple percentages have been placed into evidence. Mr. Hardin, when considering the restrictions of Dr. Bieri and the labor market access plus computer programs, found claimant to have suffered a 28 percent loss of ability to perform work in the open labor market. When looking at the restrictions of Dr. Odulio he opined claimant had suffered a 30 to 35 percent loss. In considering all of the evidence, Mr. Hardin found claimant had suffered a 29 percent loss of ability to perform work in the open labor market.

Ms. Terrill, in considering the opinions of Dr. Mills and Dr. Odulio, found claimant had suffered a 20 percent loss of ability to perform work in the open labor market. In considering the opinion and medical restrictions of Dr. Bieri she found claimant had suffered a 27 percent loss resulting in an average of 23.5 percent loss of ability to perform work in the open labor market. In considering the opinions of both Mr. Hardin and Ms. Terrill, the Appeals Board finds no justifiable reason to weigh one opinion over that of the other. As such, the Appeals Board finds overall claimant has suffered a 26 percent loss of ability to perform work in the open labor market. The Kansas Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), in considering the formula set forth in K.S.A. 44-510e, found that an average of claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages, while not mandatory, is an appropriate method of computing claimant's work disability. The Supreme Court did mandate that both the ability to perform work in the open labor market and the ability to earn comparable wages must be considered in determining the extent of work disability. The Appeals Board, in considering both claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages, finds claimant has suffered a 13 percent permanent partial general body disability as a result of the injuries suffered with respondent on November 22, 1991, and awards same.

Finally, the claimant alleges entitlement to medical benefits as a result of an anxiety attack suffered subsequent to her injury. The record is void of medical evidence to show that claimant's anxiety attack was in some way related to her work-related injury with respondent. As such, any medical bills associated with claimant's anxiety attack would not be compensable under the Workers Compensation Act and would not be the responsibility of either respondent or its insurance carrier for the injury suffered November 22, 1991.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated January 12, 1996, should be, and is hereby, modified and the claimant, Norma Hatfield, is granted an award against the respondent, Metro Courier Service, and its insurance carrier, Aetna Casualty & Surety,

for an injury suffered on November 22, 1991, for a 13% permanent partial general body disability.

Claimant is entitled to 57.57 weeks temporary total disability compensation at the rate of \$186.68 per week totaling \$10,747.17, followed by 357.43 weeks permanent partial disability compensation at the rate of \$24.27 per week in the amount of \$8,674.83 for a total award of \$19,422.

As of April 10, 1997, claimant is entitled to 57.57 weeks temporary total disability compensation at the rate of \$186.68 per week totaling \$10,747.17, followed by 223.29 weeks permanent partial disability compensation at the rate of \$24.27 per week totaling \$5,419.25, making a total due and owing of \$16,166.42, which is ordered paid in one lump sum minus amounts previously paid. Thereafter claimant is entitled to 134.14 weeks permanent partial disability compensation at the rate of \$24.27 per week in the amount of \$3,255.58 until fully paid or until further order of the Director.

Claimant is entitled to all outstanding authorized medical, unauthorized medical up to the statutory limit upon presentation of an itemized statement, and future medical upon proper application to and approval by the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Barber & Associates	
Transcript of preliminary hearing	\$142.50
Transcript of preliminary hearing	\$ 69.10
Ireland Court Reporting	
Deposition of Jerry D. Hardin	\$230.60
Transcript of regular hearing	\$189.76
Hostetler & Associates, Inc.	
Deposition of Peter V. Bieri, M.D.	\$131.95
Don K. Smith & Associates	
Deposition of Philip R. Mills, M.D.	\$172.50
Deposition of Karen Crist Terrill	\$163.50

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John B. Rathmel, Overland Park, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director